IN THE COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY, PENNNSYLVANIA
TWENTY-FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TAMAQUA EDUCATION ASSOCIATION, Plaintiff, v. TAMAQUA AREA SCHOOL DISTRICT, Defendant.	:	Case No.: S-2062-2018

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S PRELIMINARY OBJECTIONS

Date: December 21, 2018

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I. PROCEDURAL POSTURE

Tamaqua Education Association ("the Association") filed a Complaint for Declaratory and Injunctive Relief against the Tamaqua Area School District (the "District") on November 14, 2018. On December 4, 2018, the District responded to the Complaint by filing three Preliminary Objections ("POs") and a Memorandum of Law in support thereof. This Memorandum of Law is timely filed by the Association in opposition to the District's POs.

II. FACTS

The facts as alleged in the Complaint are as follows. The Association is an unincorporated association and an "employee organization" as defined in the Pennsylvania Public School Code[1] ("School Code"), 24 P.S. § 11-1101-A, and the Public Employee Relations Act,[2] 43 P.S. § 1101.301. (Compl. ¶ 1.) The Association is the exclusive bargaining representative of all professional employees of the District, including teachers, guidance counselors, and librarians. (Id.)

On September 18, 2018, the District enacted School Board Policy 705 (hereinafter "the Policy"). (Compl. ¶ 6; Compl. Ex. A.) The Policy creates a new class of government employee called "School Resource Professionals." (Id. ¶ 8.)

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[1] Act of March 10, 1949, P.L. 30, No. 14, as amended, 24 P.S. §§ 1-101 – 27-2702.
[2] Act of July 23, 1970, P.L. 563, No. 195, as amended, 43 P.S. §§ 1101.101 – 1101.2301.

School Resource Professionals are not newly hired employees; rather, they are existing District employees serving concurrently as teachers, administrators, custodians, or in other school-related positions. (Id. ¶ 7.) "School Resource Professionals" as a classification of employees, are entirely a creation of the District and its Policy. Neither the School Code, the Department of Education regulations, nor any other statute or regulation authorizes or even mentions this classification of employee.

The Policy authorizes these existing District employees to carry firearms in school so long as the employees receive specified training. (Id. ¶ 9.) The training includes initial training by the District, outside training pursuant to the Pennsylvania Lethal Weapons Training Act,[3] and annual training on District policies concerning: (1) use of deadly force; (2) legal requirements, (3) firearms safety, and (4) firearms proficiency. (Id. ¶ 10.)

In addition to authorizing the carrying of firearms in school, the Policy authorizes District employees to use deadly force. (Compl. ¶ 11.) The Policy directs School Resource Professionals to shoot people when confronted with different type of threats. (Id. ¶¶ 12-14.) For example, the Policy states that District employees should shoot at the center of available body mass when presented with a threat. (Id.

[3] Act of October 10, 2974, P.L. 705, No. 235, 22 P.S. §§ 41 – 50.1.

¶ 12.) If the threat is sufficiently serious or imminent, the Policy directs District employees to shoot the person posing a threat in the head. (Id. ¶ 14.)

The Complaint asserts two counts. In Count I, the Association contends that the District exceed its powers when it enacted the Policy. According to Count I, the District has only those powers granted to it by the School Code specifically or by necessary implication. (Compl. ¶ 32.) Count I alleges that, under the School Code, the only school district employees who can be armed are school police officers. (Id. ¶ 36.) Count I alleges that the School Code does not provide school districts with the power to authorize other employees to carry firearms, nor the power to set the terms of using those firearms, including with deadly force upon other human beings while at work. (Id.)

Count I also addresses the Policy's utilization of the Lethal Weapons Training Act. As stated above, the Policy requires District employees serving as School Resource Professionals to receive firearms training pursuant to the Lethal Weapons Training Act. (Compl. ¶ 10.) Count I alleges that the Lethal Weapons Training Act cannot be relied upon by the District to support the carrying and use of firearms by school employees because the Lethal Weapons Act explicitly states that it is only

applicable to private agents and municipal authorities,[4] and not to "local, state or federal government employees." 22 P.S. § 43.

As to Count I, the Association seeks a declaratory judgment declaring: (1) the Policy unlawful and void to the extent that it conflicts with the School Code; (2) the Policy unlawful and void to the extent that it conflicts with the Lethal Weapons Training Act; and (3) the District exceeded the authority granted to it by the School Code when it enacted the Policy.

Count II of the Complaint is derivative of Count I. In Count II, the Association alleges that it has a clear right to relief based on the allegations in Count I. As such, Court II seeks an order enjoining the District from authorizing any employee to carry a firearm on its property unless the employee has been approved to carry a firearm under the relevant provisions of the School Code.

[4] Municipal authorities are not municipalities. Rather, the Statutory Construction Act defines "municipal authorities" as "[a] body corporate and politic created pursuant to the Municipality Authorities Act of 1935 or to the Municipality Authorities Act of 1945." 1 Pa. C.S. § 1991. These include parking authorities, water authorities, and other authorities with power over public utilities.

III. QUESTIONS PRESENTED

1. **Whether the Complaint contains sufficient allegations to confer standing upon the Association.**

   Suggested answer: Yes.

2. **Whether the Complaint states a justiciable claim.**

   Suggested answer: Yes.

3. **Whether Count I of the Complaint states a legally cognizable claim.**

   Suggested answer: Yes.

4. **Whether Count II of the Complaint states a legally cognizable claim.**

   Suggested answer: Yes.

IV. ARGUMENT[5]

A. The Court should overrule the District's First PO because the Association has standing to bring this action and the matter is justiciable.

The District's first preliminary objection is really two objections fashioned into one. First, the District alleges that the Association lacks standing because it "failed to allege sufficient facts to allege, immediate or threatened injury to a [Association] member." (POs ¶ 15.) Second, the District alleges that this matter is

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[5] This Court's review of preliminary objections is well-established. This Court

> must accept as true all well-pleaded material facts alleged in the complaint and all reasonable inferences deducible therefrom. A preliminary objection should be sustained only in cases when, based on the facts pleaded, it is clear and free from doubt that the facts pleaded are legally insufficient to establish a right to relief.

Minor v. Kraynak, 155 A.3d 114, 121 (Pa. Cmwlth. 2017).

not a "justiciable controversy." (Id.) The Association will address both objections seriatim.

1. The Association sufficiently pleaded a substantial, direct, and immediate interest.

It is well settled that "an association, as a representative of its members, has standing to bring a cause of action even in the absence of injury to itself if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the challenged action." Pennsylvania Med. Soc. v. Dep't of Pub. Welfare, 39 A.3d 267, 278 (Pa. 2012). The Pennsylvania Supreme Court recently addressed standing requirements in the context of actions for declaratory judgment actions in Office of Governor v. Donahue, 98 A.3d 1223 (Pa. 2014). The Court explained that a party is aggrieved and thus has standing where the plaintiff has a substantial, direct and immediate interest. According to the Court:

> In Pennsylvania, the doctrine of standing . . . is a prudential, judicially created principle designed to winnow out litigants who have no direct interest in a judicial matter. For standing to exist, the underlying controversy must be real and concrete, such that the party initiating the legal action has, in fact, been aggrieved. As this Court explained in William Penn Parking Garage[, Inc. v. City of Pittsburgh, []346 A.2d 269 (Pa. 1975)], "the core concept [of standing] is that a person who is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' thereby and has no standing to obtain a judicial resolution to his challenge." [Id.] at 280-81. A party is aggrieved for purposes of establishing standing when the party has a substantial, direct and immediate interest in the outcome of litigation. A party's

> interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a party's interest is immediate when the causal connection with the alleged harm is neither remote nor speculative.

Id. at 1229. (some internal citations omitted). "When determining whether plaintiffs have standing to challenge the legality of an action, it must be assumed that the action is in fact contrary to some rule of law." William Penn Parking Garage, 346 A.2d at 287.

The Complaint alleges sufficient facts to confer standing to the Association in this matter. First, the facts alleged show that Association members have a substantial interest in the content of the District's illegal policy. Association members are employees of the District assigned to professional duties in the District's school buildings, interacting with school staff and students. (Compl. ¶ 17.) As employees, the terms and conditions of Association members' employment and their professional responsibility to protect students are directly subject to the policies of the District. Association members most certainly have an interest in the content of the Policy that "surpasses that of all citizens in procuring obedience to the law." Fumo v. City of Philadelphia, 972 A.2d 487, 496 (Pa. 2009).

Second, the Association pleaded sufficient facts to show a direct interest. The Complaint alleges that Association members "have been harmed by the enactment of the Policy because it authorizes employees . . . to carry firearms and use deadly

force in the workplace with substantially less training and experience than required by the General Assembly." (Compl. ¶ 18.) The reasonable inferences deducible from this allegation are that Association members have an interest in a safe work place, and that this interest is threatened by the District's illegal decision to permit certain government employees to carry loaded firearms and use deadly force without the training and experience required by the General Assembly. This allegation, accepted as true, sufficiently alleges a causal connection between the enactment of the Policy and the harm alleged.

The District argues that the Association members cannot establish standing because "the carrying of weapons for the purpose of self-defense and defense of other persons by [District] employees does not equate to an immediate or threatened *injury* to any [Association] member." (District's Memorandum of Law ("MOL") at 6 (emphasis added).) The District appears to confuse the allegations required to establish standing at the pleading stage with the facts necessary to prove an *injury* to a factfinder at later stages in the litigation process. At the pleading stage, an allegation that the District's illegal policy harms or threatens Association members must be accepted as true. The Association must only allege facts that show the "*asserted* violation shares a causal connection with the *alleged* harm." Donahue, 98 A.3d at 1229 (emphasis added). Determining the *extent of an injury* inflicted upon Association members by the Policy –even assuming that this question is relevant at

all in Declaratory Judgment actions – requires a factual analysis not appropriate at this juncture.

Finally, the Association sufficiently pleaded an immediate interest in the subject matter of the case. The Association alleges facts showing that the harm complained of is neither remote nor speculative. According to the Complaint, "the Policy is currently in effect, and School Resource Professionals may carry firearms in the District's schools in contravention of the law in the immediate future . . ." (Compl. ¶ 20.)

The Supreme Court provides courts of common pleas with an interpretive guideline for instances where, like here, a plaintiff seeks relief by arguing that the defendant's actions violate a statute. The Supreme Court has held that the immediacy prong of the standing test is met when a party is "within the zone of interests of the statutory or constitutional protection claimed." Johnson v. Am. Standard, 8 A.3d 318, 329–30 (Pa. 2010).[6]

Here, the Association alleges that the Policy violates Article XIII-C of the School Code, 24 P.S. § 13-1301-C – 13-1314-C. This statutory article provides school districts with various authorities intended to protect every person, whether an

[6] In Johnson, the Court went out of its way to make clear that this test is "merely a guideline used to aid courts in finding immediacy" and not a determinative factor. Johnson, 8 A.3d at 331-32. According to the Court, "should . . . a party's immediate interest not be apparent, a zone of interests analysis may (and should) be employed to assist a court in determining whether a party has been sufficiently aggrieved, and therefore has standing." Id. at 333.

adult or student, in the public schools of this Commonwealth. Clearly, Association members working as teachers, guidance counselors, and librarians in District schools fall within the zone of interest protected by Article XIII-C of the School Code. Therefore, the Association has pleaded sufficient facts to establish immediacy.

For the foregoing reasons, this Court should overrule the District's first PO to the extent that it alleges that the Association lacks standing.

2. The matter is justiciable.

The District next argues that the Association has not sufficiently pleaded a justiciable controversy. (District's MOL at 7.) The District contends that the courts may only grant relief under the Declaratory Judgments Act if the declaration will practically help end imminent and inevitable litigation, and that no litigation is inevitable here. (Id.) The District goes so far as to argue that unless an innocent person is shot by an employee carrying a firearm pursuant to the Policy, no actual controversy can be found. Thankfully, declaratory relief does not require such a high standard.

While a plaintiff cannot sustain a declaratory judgement action without demonstrating the existence of an actual controversy, see Donohue, 98 A.2d at 1229, "the subject matter of the dispute giving rise to a request for declaratory relief need not have erupted into a full-fledged battle."Berwick Twp. v. O'Brien, 148 A.3d 872, 881 (Pa. Cmwlth. 2016). Courts will find an actual controversy if "the ripening

seeds of [a controversy] exist." Id. (quoting Lakeland Joint Sch. Dist. Auth. v. Sch. Dist., 200 A.2d 748, 751 (Pa. 1964) (quoting In re Cryan's Estate, 152 A. 675, 678 (Pa. 1930).)) The term "ripening seeds" means "a state of facts indicating 'imminent' and 'inevitable' litigation." In re Cryans Estate, 152 A. at 678.

> If difference between the parties concerned, as to their legal rights, have reached the stage of antagonistic claims, which are being actively pressed on one side and opposed on the other, an actual controversy appears; where, however, the claims of the several parties in interest, while not having reached that active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.

Id.

Here, the Association alleges facts showing the "ripening seeds of a controversy." The Complaint avers that the Policy, which is currently in effect, violates the law and puts Association members at imminent risk of harm. This is not a case where the Association is asking the Court to resolve a future controversy that may not arise. A dispute over legal rights exists today. Given the diametrically opposed views and interests, continued conflict between the parties is immediate and unavoidable. The jurisdiction conferred on the courts by the Declaratory Judgments Act was created for cases precisely like this one. The moment the District enacted the policy that permits it to immediately deploy armed school employees in the buildings where Association members work every day, the "seeds of a controversy"

became ripe, conferring jurisdiction on this Court to resolve the controversy. This Court should, therefore, overrule the District's first PO in its entirety.

B. The Court should overrule the District's Second PO because District exceeded its authority when it enacted the Policy.

The District's second PO demurs to Count I of the Complaint. By demurring to Count I, the District puts the central issue of this case squarely before the Court.

In its PO, the District agrees with the Association that it has no powers but those granted expressly to it by the School Code, or by necessary implication thereof. (Comp. ¶ 32; Preliminary Objections ¶ 18.) The District also agrees that there is no specific School Code provision authorizing the District to enact the Policy. (Compl. ¶ 35; POs ¶ 19;) see Giacomucci v. SE. Delco Sch. Dist., 742 A.2d 1165, 1172 (Pa. Cmwlth. 1999) (reasoning that the School Code's silence on a matter, by itself, "do[es] not dispense with the requirement that the School District must point to some provision in the School Code which, by necessary implication, permits" the challenged action.) Where the parties part ways is on the question of whether the Policy is authorized by "necessary implication" of Article XIII-C of the School Code, 24 Pa. C.S. §§ 13-1301-C – 13-1314-C .

The District argues that the Policy is authorized by necessary implication of Article XIII-C of the School Code, and specifically Section 1312-C. Section 1312-C provides: "[n]othing in this article shall be construed to preclude a school entity or nonpublic school from employing other security personnel as the school entity or

nonpublic school deems necessary." 24 P.S. § 13-1312-C. According to the District, the General Assembly's decision to authorize school districts to employ security personnel not otherwise authorized in the School Code shows its intent to authorize school districts to arm employees and to authorize employees to use deadly force. (District's MOL at 10-11.)

As will be discussed *infra*, the District's construction of Section 1312-C of the School Code is completely divorced from, and contrary to, the statutory scheme as a whole; ignores relevant legislative history; and stands in stark contrast to every statute of this Commonwealth involving the authority of political subdivisions to arm their employees with firearms.

1. The General Assembly provided for a comprehensive scheme of school security.

Pursuant to the Statutory Construction Act, "the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). The best indication of the General Assembly's intent is the plain language of the statute. Commonwealth v. Shiffler, 879 A.2d 185, 189 (Pa. 2005). "Every statute shall be construed, if possible, to give effect to all its provisions." Id.[7] Because the General Assembly intends the entire statute to be

[7] Courts should ascertain the intention of the General Assembly in the enactment of a statute by presuming the following:

> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

effective and certain, construction of a single provision must occur within the context of the statute as a whole. See Pelter v. Com., Dep't of Transp., Bureau of Driver Licensing, 663 A.2d 844, 848 (Pa. Cmwlth. 1995) ("[I]ndividual provisions in a comprehensive legislative scheme should not be read abstractly, but rather with a view to their place in the entire structure").

Article XIII-C of the School Code, entitled "School Police Officers and School Resource Officers" 24 P.S. §§ 13-1301-C – 13-1314-C, contains 14 sections that, when read together, comprehensively address the security services school districts may utilize to maintain safe schools. Article XIII-C begins by defining three of the four classifications of security personnel school districts may utilize:

> (2) That the General Assembly intends the entire statute to be effective and certain.
> (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.
> (4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.
> (5) That the General Assembly intends to favor the public interest as against any private interest.

1 Pa. C.S. § 1922. When the words of the statute are not explicit, courts may consider:

> (1) The occasion and necessity for the statute.
> (2) The circumstances under which it was enacted.
> (3) The mischief to be remedied.
> (4) The object to be attained.
> (5) The former law, if any, including other statutes upon the same or similar subjects.
> (6) The consequences of a particular interpretation.
> (7) The contemporaneous legislative history.
> (8) Legislative and administrative interpretations of such statute.

1 Pa. C.S. § 1921(c).

> "School police officer." A law officer employed by a school district whose responsibilities, including work hours, are established by the school district.
>
> "School resource officer." A law enforcement officer commissioned and employed by a law enforcement agency whose duty station is located in a school entity and whose stationing is established by an agreement between the law enforcement agency and the school entity.
>
> "School security guard." An individual employed by a school entity or a third party contractor who is assigned to a school for routine safety and security duties and is not engaged in programs with students at the school.

24 P.S. § 13-1301-C The fourth classification of security personnel – retired law enforcement officers serving as independent contractors – is defined in its own section as "individuals who are retired Federal agents or retired State, municipal or military police officers or sheriffs." 24 P.S. § 13-1311-C.

a. School Police Officers

School police officers are employees of the school district that serve as "law officer[s]." 24 P.S. § 13-1301-C. School police officers must wear a uniform and badge while on duty, and must, before commencing employment, swear an oath of office before a district judge or prothonotary. 24 P.S. §§ 13-1304-C; 1307-C.

While school police officers work directly for school districts, a school district cannot just hire anyone it wishes to serve as a school police officer. The power to hire school police officers is shared with the court of common pleas. Under the scheme, a school district designates a person as a school police officer and the court

appoints the person. 24 P.S. § 1301302-C. According to Section 1302-C of the School Code,

> A school entity or nonpublic school may apply to a judge of the court of common pleas of the county within which the school entity or nonpublic school is situated to appoint a person or persons as the board of directors of the school entity or the administration of the nonpublic school may designate to act as school police officer for the school entity or nonpublic school.

Id.

School districts are provided "various options as to the powers that each school police officer has[,] from only allowing that person to 'enforce good order,' to giving a school police officer full police powers, or somewhere in between." In re Gateway Sch. Dist. to Approve the Arming of Sch. Police Officers, 154 A.3d 886, 890 (Pa. Cmwlth. 2017) (interpreting the identical provision in effect in 2017); see also 24 P.S. § 13-1306-C (stating the powers and duties of school police officers). Only the court of common pleas can provide school police officers with full police powers. 24 P.S. § 13-1306-C.

School police officers given full police powers may, by definition, carry a firearm in school. The School Code also provides school districts with the power to authorize school police officers to carry firearms if the officer was not otherwise given full police powers by the court. 24 P.S. § 13-1305-C. In either case, however, the School Code requires school police officers to receive certain training before being permitted to carry a firearm in school. Section 1305-C provides:

> A school police officer who has been granted [full police powers by the court] or has been authorized to carry a firearm must, before entering upon the duties of the office, successfully complete training as set forth in [the Municipal Police Education and Training Law, 53 Pa. C.S. §§ 2161-2171] or have graduated from the Pennsylvania State Police Academy and have been employed as a State trooper with the Pennsylvania State Police and separated from service in good standing.

24 P.S. § 13-1305-C. In other words, every school police officer appointed by a court must have Municipal Police training or experience as a State Trooper in order to carry a firearm in a school building.

The School Code also contains a required oversight mechanism related to school police. Section 1303-C of the School Code requires school districts that employ school police officers to submit an annual report to the Department of Education detailing the identity of the officer, the municipalities comprising the school district, and the date and type of training provided to each school police officer. 24 P.S. § 13-1303-C.

b. School Resource Officers

Section 1309-C of the School Code provides school districts with an alternative to hiring school police officers. According to Section 1309-C, school districts "may enter into cooperative police service agreements" with "local law enforcement within the municipality" in which the school district is located. 24 P.S. § 13-1309-C. Through these agreements, the school may utilize the services of "school resource officer[s]." 24 P.S. § 13-1301-C. A school resource officer has a

duty station in the school, but he or she is employed by the municipal law enforcement agency. Id. As a law enforcement officer employed by the municipality, school resource officers are concurrently governed by the School Code and the laws governing municipal police forces. Pursuant to the laws governing municipal police forces, before a municipality can authorize a police officer to carry a firearm, the officer must have received training pursuant to the Municipal Police Education and Training Act. 53 Pa. C.S. § 2167(a).

c. Independent Contractors

Section 1311-C of the School Code provides school districts with the authority to enter into professional services contracts with "[r]etired Federal agents or retired State, municipal or military police officers or sheriffs" to provide school security services. 24 P.S. § 13-1311-C. Each classifications of retired police officers would have received appropriate police firearms training (state, federal or municipal) prior to retirement. The School Code also requires these retired law enforcement personnel to receive the same annual firearms training as school police officers and school resource officers. According to Section 1311-C, school districts "shall ensure the independent contractors . . . complete such annual training as is required by [the Municipal Police Education and Training Law]." Id. Like school police and school resource officers, retired police officers have been extensively vetted by their prior government employer and have sworn an oath of office. 24 P.S. § 13-1311-C.

d. School Security Guards

The fourth type of security staff a school district may utilize are school security guards. A school security guard is "[a]n individual employed by a school entity or a third party contractor who is assigned to a school for *routine safety and security duties* and is not engaged in programs with students at the school." 24 P.S. § 13-1301-C (emphasis added). These individuals handle routine security duties such as enhanced campus supervision, assistance with disruptive students, monitoring visitors, and other "functions which improve and maintain school security." 24 P.S. § 13-1314-C. Because school security guards are in place to address "routine" duties, the General Assembly did not impose the same rigorous training and experience requirements on them that are required of school police or other law enforcement personnel who are authorized to carry a firearm in school.

e. Other Security Personnel

Section 1312-C of the School Code provides that, in addition to the four types of security personnel discussed above, school districts may employ "other security personnel as the school [district] deems necessary." 24 P.S. § 13-1312-C. The School Code provides no details whatsoever on the qualifications, training, duties or roles of these "other security personnel." While the assignment of roles and responsibilities to these employees is within the discretion of each school district, that authority is constrained by the other provisions of the School Code, including

those provisions referenced above dealing specifically with the authority to carry firearms.

2. The District's construction of Article XIII-C is not supported by language of the statute and undermines the comprehensive scheme.

The District argues that assigning teachers and other school staff already working in the schools the concurrent authority to carry and use firearms is permitted by Section 1312-C of the School Code. However, there is no explicit authorization in Section 1312-C or elsewhere in Article XIII-C stating that "other security personnel" may carry firearms in school. The construction of Section 1312-C must, therefore, be aided by the tools of statutory construction. 1 Pa. C.S. § 1921(c). When read as a whole, Article XIII-C shows the General Assembly's intent to provide school districts with the power to authorize the use of firearms only by its employees who are serving as school police officers, and to no other school employee.[8] Article XIII-C provides school districts with the discretion to authorize its employees to use firearms under the condition that the employee is (1) vetted and appointed by the court; (2) swears and oath before a judge or prothonotary; and (3) is trained pursuant to the Municipal Education and Training Law or at the State Police Academy. Because the "other security personnel" authorized by Section 1312-C have not been

[8] The other law enforcement personnel authorized to carry firearms in school are not school district employees. School police officers are the only *employees* that are so authorized by the School Code.

vetted or appointed by the court, have not sworn an oath of office before a district judge or magistrate,[9] and are neither trained pursuant to the Municipal Police Education and Training Law nor are graduates of the State Police Academy, they cannot carry a firearm in school. Section 1312-C of the School Code should be construed, therefore, to provide school districts with the discretion to employ other persons to serve in positions such as security coordinators, hall monitors, video surveillance technicians, community liaisons focused on reducing violence, or other security related roles.

This Court should reject the District's proffered construction of Article XIII-C of the School Code for the following reasons.

First, it is well established that "where the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded." Doe v. Franklin Cty., 174 A.3d 593, 608 (Pa. 2017). The School Code contains no general authorization for school districts to provide its employees with firearms in school. Rather, the General Assembly decided to explicitly tie the discretion to arm school employees to the provisions authorizing the use of school police officers. The powers tightly tied to court-

[9] School employees are generally required to swear an oath of office. Section 4 of the Pennsylvania Loyalty Act, the Act of December 22, 1951, 65 P.S. § 214. Yet, unlike school police, school employees need not swear before a judge or prothonotary, nor is the record of the oath kept by the court. We must assume that the General Assembly added Section 1304-C because it intended to impose requirements beyond those already in place for school employees.

appointed school police officers in Sections 1302-C through 1306-C of the School Code cannot be applied to the "other security personnel" school districts may employ via Section 1312-C of the School Code.

Second, in enacting the "other security personnel" provision of Section 1312-C, the General Assembly did not intend to craft a provision that renders other provisions of the same article meaningless. See 1 Pa. C.S. § 1922(2) (stating that the court must presume that "the General Assemble intends the entire statute to be effective and certain.") If by enacting Section 1312-C, the General Assembly intended to provide school districts with unfettered power to arm its employees with firearms, Sections 1302-C through 1306-C of the School Code related to school police officers would be superfluous. The manifest purpose of Section 1305-C of the School Code is to ensure that school police officers who carry firearms in school have received substantial and proven training in law enforcement skills and strategies. The District's construction of Section 1312-C would enable school districts to completely bypass the explicit requirements of Sections 1302-C through 1306-C by employing and arming untrained and unvetted individuals. The District cannot avoid the specific statutory requirements associated with the hiring, court approval and training of "school police officers" by creating their own classification of armed employees and calling them "School Resource Professionals." Construing

the School Code that way destroys the protections which the act was manifestly designed to secure.

The District's construction of Article XIII-C would lead to an absurd result. See 1 Pa. C.S. § 1922(1) (courts must presume that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.") Teachers, administrators, custodians and others who have been neither vetted by a court nor trained in law enforcement skills, and who are subject to no state-level oversight, would be given the same ability and authority to use deadly force in school as highly trained police officers, whom have taken an oath before a judge, were vetted and appointed by the court, and are subject to oversight by the state Department of Education. This Court should conclude that the General Assembly did not intend such an absurd result.

3. Legislative history of Article XIII-C supports the Association's construction of Article XIII-C.

The above construction is supported by the legislative history of Article XIII-C of the School Code. See 1 Pa. C.S. §§ 1921(c)(5), (c)(7) (when the words of a statute are not explicit, the intent of the General Assembly may be ascertained by considering the former law and the "contemporaneous legislative history").

The original precursor to Article XIII-C of the School Code was the Act of June 25, 1997, P.L. 297, No. 30 ("Act 30 of 1997"). Act 30 of 1997 provided, for the first time, a comprehensive legislative scheme addressing school security. In

Act 30 of 1997, the General Assembly provided school districts with a variety of tools to strengthen school security. Among these tools were "school police officers."[10] Pursuant that Act, school police officers could only carry a firearm in school if the court of common pleas specifically authorized the police officers "to exercise the same powers" as "police of the municipality where the school property is located." Act 30 of 1997 at § 788(c).[11] Next, Act 30 of 1997 authorized school districts to "enter into cooperative police service agreements" with municipal police forces. Id. at § 778(f).[12] Finally, Act 30 of 1997 included a provision that gave school districts the authority to hire other security personnel besides law enforcement officers, such as school security guards, hall monitors, security coordinators, and other related positions. To that end, Act 30, like the present statute, stated that "nothing in this section shall be construed to preclude a school district from employing other security personnel as the school district deems necessary." Id. at § 778(h).

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[10] Prior to Act 30 of 1997, the School Code provided schools with the authority to hire security guards and "policemen," who exercised "the powers of a constable in this Commonwealth." Act of March 10, 1949, P.L. 30, No. 14 at § 778. These "policemen" were appointed by the court of common pleas, were required to wear a uniform and badge, and were required to take an oath of office. Id. The School Code did not address the use of firearms until 1997.

[11] As discussed *infra*, the language in the current School Code granting school districts the implied power to authorize those school police officers not authorized to exercise police powers to carry firearms was added in 2004.

[12] Act 30 of 1997 did not specifically use the term "school resource officers" to describe police officers working in schools but employed by municipal police forces. That term first appeared in law in 2018.

In 2004, the General Assembly amended the School Code to specifically address the use of firearms by school police officers. Act of July 4, 2004, P.L. 536, No. 70 ("Act 70 of 2004"). Pursuant to Act 70 of 2004, school police officers could carry a firearm in school provided that the school police officer successfully completed training set forth in the Municipal Police Education and Training Law. Id. at § 778(b.1). Act 70 of 2004 also granted school districts with the power to authorize school police officers not otherwise given full police powers by the court to carry a firearm in school. Id. Finally, Act 70 of 2004 required school districts to annually report to the Department of Education detailing the number of police officers it employed and the type of training the each school police officer received. Id. at § 778(a.1). Act 70 of 2004 made no change in the language authorizing the employment of "other security personnel as the school district deems necessary."

This past summer,[13] the General Assembly added significant school safety provisions to the School Code. Act of June 22, 2018, P.L. 327, No. 44 ("Act 44 of 2018"). Although school safety as a general matter was extensively addressed through new grant-making, oversight, and coordination mechanisms, changes to the provisions addressing school security personnel discussed above were relatively

[13]In the time between 2004 and 2018, the General Assembly amended what is now Article XIII-C of the School Code a third time in 2014. Act of July 9, 2014, P.L. 1039, No. 122 ("Act 122 of 2014"). Act 122 of 2014 expanded the provision addressing the use of firearms by school police by permitting school police officers that "graduated from the Pennsylvania State Police Academy and have been employed as a State Trooper" to carry firearms in school. Id. at § 778(b.1).

modest. The most significant change effected by Act 44 of 2018 was the explicit grant of power to school district to utilize the services of independent contractors. Act 44 of 2018 empowered school districts to enter into contracts with: (1) retired law enforcement who have received the same training as school police; and (2) individuals with no police experience or training to serve as school security guards. 24 P.S. §§ 13-1311-C, 1314-C. Prior to Act 44 of 2018, school districts did not have the explicit authority under the School Code to enter such contracts.

Absent from Act 44 of 2018 is any mention of granting school districts the authority to provide teachers and other employees with firearms and the right to use deadly force. The General Assembly's decision to deny school districts this authority was not due to a lack of consideration of the matter. The General Assembly has considered providing school districts with the authority to provide school employees with firearms in each of the last three legislative sessions. (Ex. A.)[14] Indeed, at the same time Act 44 of 2018 was proceeding through the General Assembly, the Senate had already passed Senate Bill 383, authorizing school districts to "establish a policy permitting school personnel access to firearms in the buildings or on the grounds of a school."[15] (Exs. A, B.) Yet, instead of including

[14] The Court may take judicial notice of items in the Legislative Journals and various versions of bills introduced or enacted by the General Assembly. Pennsylvania Sch. Boards Ass'n, Inc. v. Com. Ass'n of Sch. Adm'rs. Teamsters Local 502, 696 A.2d 859, 863 (Pa. Cmwlth. 1997).

[15] Senate Bill 383 passed the Pennsylvania Senate on June 29, 2017 by a vote of 28-22. The Pennsylvania House of Representatives took no action on this bill prior to the expiration of the 2017-2018 legislative session. As such, Senate Bill 383 is officially dead.

the authorities outlined in Senate Bill 383 in Act 44, the General Assembly decided to provide school districts with the authority to enter into contracts with retired law enforcement officers. The General Assembly's decision to address the need to provide additional tools to school districts to address security matters as it did is indicative of its intent to *not* provide school districts with the authority to permit employees to carry firearms in school.

The District posits in its Memorandum of Law that the General Assembly "is now well aware of new security concerns regarding the safety of students and staff." (District's MOL at 9.) According the District, the General Assembly was prompted to adopt Act 44 in the summer of 2018 to address the fact that "over the past several years school shootings have become more frequent." (District's MOL at 9-10 (quoting 24 P.S. § 13-1301-D).) The District contends that because the new amendments include Section 1312-C of the School Code, the General Assembly must have intended to grant school districts the authority to provide firearms to employees. (Id.) According to the District, any other construction would render Section 1312-C of the School Code meaningless. (Id. at 10-11.)

The District raises the General Assembly's decisions in 2018 as if the General Assembly was writing on a blank slate. In light of the legislative history outlined above, the District's argument appears to be that the General Assembly crafted Section 1312-C in 2018 as a way to stealthily pass Senate Bill 383 into law without

complying with the constitutional requirements of bicameralism and presentment. What the District's argument ignores is that the language found in Section 1312-C was enacted 21 years ago. Throughout those 21 years, no court has interpreted Section 1312-C in the District's preferred manner. Section 1312-C is intended to provide school districts with the same powers it has always provided: namely, the discretion to employ staff not otherwise identified in Article XIII-C to provide security. Such staff include, *inter alia*, hall monitors, security coordinators, surveillance technicians, and community liaisons that focus on reducing violence. Act 44 of 2018 did not stealthily transform a long-standing provision intended to provide school districts with the authority to hire security personnel other than law enforcement into a provision that permits any local school district to enact a local "policy" to arm its principals, teachers, janitors, and bus drivers, without law enforcement training or court approval, thereby usurping the entire legislative scheme.

4. A review of other similar statutes supports the Association's construction of Article XIII-C.

The General Assembly has addressed the use of firearms by government employees working for political subdivisions[16] in similar statutes. See 1 Pa. C.S. §

[16] Political subdivisions are defined by the Statutory Construction Act as "any county, city, borough, incorporated town, township, school district, vocational school district and county institution district." 1 Pa. C.S. § 1991. Like school districts, all other political subdivisions are creations of the General Assembly and "possess only such powers of government as are expressly

1921(c)(5) (stating that the intent of the General Assembly may be ascertained by assessing other statutes upon the same or similar subjects). In each of these enactments, the General Assembly has taken great care when authorizing government employees to carry firearms at work. For example:

- Local municipalities may only authorize their employees to carry firearms after the employees first receive training pursuant to the Act referred to as the Municipal Police Education and Training Law. 53 Pa. C.S. § 2167(a).
- Counties may authorize their sheriffs, detectives, park officers, or police to carry firearms in the course of their duties only if the individuals have successfully completed the requirements of the Municipal Police Education and Training Law. 53 Pa. C.S. § 2162;
- Counties may authorize employee probation officers to carry firearms provided that the probation officer completes training under the County Probation Officers' Firearm Education and Training Program. 61 Pa. C.S. § 6306.
- Constables may carry a firearm so long as they meet the qualifications of The Constables' Education and Training Board, with the review and approval of

granted to it and as are necessary to carry the same into effect." Appeal of Gagliardi, 163 A.2d 418, 419 (Pa. 1960).

the Pennsylvania Commission on Crime and Delinquency. 44 Pa. C.S. § 7148.

- Counties may authorize corrections officers and prison staff to carry firearms in emergency situations pursuant to the standards found in the regulations of the Pennsylvania Department of Corrections, 37 Pa. Code §§ 95.221, 95.241. 61 Pa. C.S. § 1105.

The only entities to which the General Assembly has delegated the authority to develop their own rules and regulations associated with the use of firearms by government employees are Commonwealth agencies.[17] See e.g., Section 711 of the Administrative Code, 71 P.S. § 251 (addressing the rules and regulations governing the Pennsylvania State Police). No political subdivision in the Commonwealth has the power to craft its own rules and regulations on the use of firearms by government employees. It would be preposterous for the General Assembly to *explicitly and carefully* address the use of firearms by all government employees working for political subdivisions; and, then in 2018, delegate the responsibility to craft such rules to school districts *by implication.*

[17] The Judicial Code defines Commonwealth agency as "any executive agency or independent agency." 42 Pa. C.S. § 102.

5. The Criminal Code is irrelevant to the instant matter.

The District argues in its Memorandum of Law that Section 912(c) of the Criminal Code, 18 Pa. C.S. § 912(c), shows that the General Assembly does not prohibit school employees from carrying weapons while on school property. (District's MOL at 11-12.) Section 912(b) of the Crimes Code states:

> A person commits a misdemeanor of the first degree if he possesses a weapon in the buildings of, on the grounds of, or in any conveyance providing transportation to or from any elementary or secondary publicly-funded educational institution, any elementary or secondary private school licensed by the Department of Education or any elementary or secondary parochial school.

18 Pa. C.S. § 912(b). Section 912(c) of the Crimes Code provides for a defense to a violation of Section 912(b). Section 912(c) states: "It shall be a defense that the weapon is possessed and used in conjunction with a lawful supervised school activity or course or is possessed for other lawful purpose." 18 Pa. C.S. § 912(c). In light of the defense, the District argues:

> Arguably there would be no legal impediment for a school employee to obtain a license to carry as issued by the County Sheriff and possess this weapon on school property. The employee would be carrying the weapon in an unofficial but permitted capacity as a private citizen. Arguably a lawful purpose could be construed as self-defense or defense of others (for example protection of children).

(District's MOL at 12.)

The District's invitation to this Court to interpret Article XIII-C of the School Code based upon an unrelated provision of the Crimes Code violates the rules of

statutory construction, which permits courts to construe a statute by considering statutes on "similar subjects." 1 Pa. C.S. § 1921(c)(5). The Crimes Code and the School Code do not address similar subjects. The Crimes Code defines and prohibits criminal conduct; the School Code authorizes school districts to educate the youth of the Commonwealth.

Moreover, the District's argument concerning Section 912 of the Crimes Code is completely irrelevant to the instant matter. Whether the Policy violates the Crimes Code is not at issue in this case.

In Bolden v. Chartiers Valley School District, 869 A.2d 1134 (Pa. Cmwlth. 2005), the Commonwealth Court decided an appeal by a school district administrator who was suspended without pay for inadvertently bringing a loaded firearm onto school property. The appellant argued that his employment could not be suspended under the School Code[18] because his act did not satisfy the *mens rea* requirement associated with a violation of Section 912 of the Crimes Code. Bolden, 869 A.2d at

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[18] The appellant in that case was suspended pursuant to Section 514 of the School Code, which provides, in relevant part:

> The board of school directors in any school district, except as herein otherwise provided, shall after due notice, giving the reasons therefor, and after hearing if demanded, have the right at any time to remove any of its officers, employes, or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct.

24 P.S. § 5-514.

1137. The Commonwealth Court rejected the appellant's argument, reasoning that "[t]he discussion of whether [the appellant] violated Section 912 of the Crimes Code is somewhat academic . . . because a criminal violation is not necessary to establish a violation of . . . the School Code." Id. at 1139. The Commonwealth Court explicitly refused to even consider the appellant's argument that "because his gun was registered[,] his conduct f[e]ll within the exception to Section 912[,] which states that no crime is committed if [the appellant] possessed the gun with a lawful purpose." Id. at 1139 n 7.

Following the Commonwealth Court's reasoning, there is no justification for the Court to conclude that the Policy complies with the School Code solely because it does not require school employees to commit a crime. In fact, the School Code is replete with examples where the General Assembly has prohibited non-criminal conduct in public schools. For example, pursuant to Section 1112 of the School Code, school employees are prohibited from wearing "any dress, mark, emblem, or insignia indicating that such teacher is a member or adherent of any religious order, sect, or denomination" while at work. 24 P.S. § 11-1112(a). Wearing religious-based clothing or jewelry is absolutely not a crime. The School Code also prohibits school districts from hiring close familial relatives of any school board member, notwithstanding the fact that nepotism is not a crime. 24 P.S. § 1-1111.

For the same reason, the District's citation to Commonwealth v. Goslin, 156 A.3d 314 (Pa. Super. 2017) to support its argument lacks any persuasiveness to this matter. Goslin addressed whether a parent that inadvertently brought a carpenter's knife to school can be found guilty of a first-degree misdemeanor under the Crimes Code. Goslin raised a question of criminal law. The question raised here – whether the District has the discretion to arm its teachers or other school staff – depends solely on powers and authority granted to the District under the School Code.

Finally, the District's argument concerning whether a school employee may carry a weapon to school as a "private citizen" is also not at issue here. The Policy governs the acts of school employees while at work, not private citizens who happen to enter the school.[19] Whether school districts can authorize employees to carry and use firearms at school is entirely dependent on whether the General Assembly has given school districts that authority.

6. The Lethal Weapons Training Act

The Complaint alleges that the District exceeded its power by authorizing District employees to carry firearms in school so long as the employee receives training under the Lethal Weapons Training Act, 22 P.S. § 41-50.1. (Compl. ¶ 37;

[19] The right of the General Assembly to limit the use of firearms by its employees on its property is well-established. See Perry v. State Civil Serv. Comm'n (Dep't of Labor & Indus.), 38 A.3d 942, 955 (Pa. Cmwlth. 2011) (upholding a rule against carrying a firearm at a government job).

Compl. at Ex. A at 1.) The District's demurrer does not address this allegation. As such, this Court cannot dismiss Count I in its entirety *sua sponte*, and the Association need not address the matter any further.

To the extent that a response is required, it is clear that the District enacted the Policy *ultra vires* because the Lethal Weapons Training Act explicitly states that the training it provides applies only to private actors and municipal authorities. The Act is expressly *not applicable* to the employees of municipal subdivisions, including school districts. 22 P.S. § 43. As such, school employees are prohibited by law to undergo the training required by the District's Policy.

The District's lack of authority in this area is further evidenced by the absence of any mention of the Lethal Weapons Training Act in the School Code. Instead, the School Code applies training requirements found in the Municipal Police Education and Training Law and used at the State Police Academy. See 24 Pa. C.S. §§ 13-1305-C, 13-1311-C. This Court must presume that the General Assembly had a reason to utilize the training provided under Municipal Police Education and Training Law and at the State Police Academy to ensure school police and independent contractors are adequately trained, and not any other training program.

Political subdivisions may, in some circumstances, be held liable for the acts of its employees. See 42 Pa. C.S. § 8542 (listing the exceptions to government immunity); 42 U.S.C. § 1983 (providing for a cause of action against government

employees acting under the "color of state law" for violations of the United States Constitution). Liability of political subdivisions is passed on to the taxpayers. As such, the General Assembly ensures that the training and vetting standards applicable to government employees are substantially greater than those applicable to private actors. Compare 37 Pa. Code § 203.11 (regulations promulgated pursuant to the Municipal Police Education and Training Law) with 37 Pa. Code § 21.11 (regulations promulgated pursuant to the Lethal Weapons Training Act). For example, before an individual can enroll in the training program under Municipal Police Education and Training Law, the police officer must undergo a background check that includes: (1) personal interviews with three people that have knowledge of the applicant but are not related to the applicant; (2) personal interviews with the individual's former employers; (3) a credit history check; and (4) a check of the individual's driving record. 37 Pa. Code § 203.11(10). Such entry requirements are absent from the program authorized under the Lethal Weapons Training Act. Moreover, individuals trained pursuant to the Municipal Police Education and Training Law must pass a physical fitness test to ensure the applicant is able to physically perform law enforcement duties. 37 Pa. Code § 203.11(8). There is no physical fitness requirement under the Lethal Weapons Training Act. Finally, training under the Municipal Police Education and Training Law must be overseen by a training school director with at least 10 years of experience in law enforcement.

37 Pa. Code § 203.37(b)(2). The only requirement for training school directors under the Lethal Weapons Training Act is that the director has not been convicted of certain offenses. 37 Pa. Code § 21.32.

7. Summary of Argument on the District's Second PO.

In sum, this Court should overrule the District's second PO because the Policy violates the General Assembly's intent in enacting Article XIII-C of the School Code. The General Assembly's intent can be ascertained in three ways. First, pursuant to the plain language of Article XIII-C of the School Code, school police officers are the only class of District employee the District may authorize to carry firearms in school. Giving the District's its favored interpretation of Section 1312-C of the School Code would undermine the statutory scheme and render Sections 1302-C through Section 1307-C of the School Code superfluous. Second, the legislative history of Article XIII-C shows that the General Assembly imposed thoughtful limits on the use of firearms by school employees. The legislative history shows that in 2018, the General Assembly decided to address the proliferation of school shootings in the United States by authorizing school district to enter into independent contracts with retired law enforcement agents, and to not grant school districts the discretion to arm school employees. Third, the intent of the General Assembly can be ascertained by looking at how the General Assembly addressed the use of firearms by government employees in other enactments. In no statute does

the General Assembly delegate authority to a political subdivision to establish its own rules and regulations governing the use of firearms by government employees. When the General Assembly speaks on this matter, it sets standards explicitly. For these reasons, and because the District does not demurrer to the Association's argument regarding the Lethal Weapons Training Act, this Court should conclude that the Complaint is legally sufficient and overrule the District's second PO.

C. The Association has a clear right to a permanent injunction.

Finally, the District's third PO demurrers to Count III of the Complaint. Count III of the Complaint seeks an order permanently enjoining the District from authorizing any government employee from carrying a firearm on the District's property unless the government employee has been authorized to do so by the School Code. The District's sole argument is that because the Association is not entitled to relief under Count I and has no standing, the court should dismiss Count II. The District admits that if the Court overrules its first two POs, it has no grounds to a demurrer with respect to Count II.

The Association agrees with the District that Count II is derivative of Count I. Count II must stand or fall with the Court's resolution of Count I. Because the Association has a clear right to relief in Count I, and has standing to bring this action, this Court should overrule the District's third PO.

V. CONCLUSION

For the reasons stated herein, the Association, respectfully, requests that the Court overrule the District's POs in their entirety.

Respectfully Submitted,

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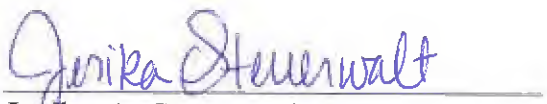
CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Tamaqua Education Association

Signature: 

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IN THE COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY, PENNNSYLVANIA
TWENTY-FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TAMAQUA EDUCATION ASSOCIATION, Plaintiff,	:	
v.	:	Case No.: S-2062-2018
TAMAQUA AREA SCHOOL DISTRICT, Defendant.	:	

CERTIFICATE OF SERVICE

I, Jesika A. Steuerwalt, Esquire, counsel for the Tamaqua Education Association, PSEA/NEA, do hereby certify that I have, on this 21st day of December 2018 served a true and accurate copy of Plaintiff's Memorandum of Law in Opposition to Defendant's Preliminary Objections via Electronic Mail and First Class Mail, upon the Defendant at the address as listed below:

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